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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 LONNY JOSEPH DITIRRO,

11 Defendant.

Case No. 2:16-cr-216-KJD-VCF

ORDER

12 Before the Court is the Government's Omnibus Motion in Limine to Exclude and Limit
13 Argument, Questioning, and Evidence at Trial (#99) to which Mr. Ditirro responded (#102).

14 **I. Background**

15 On June 10, 2016, the Government charged Mr. Ditirro with one count of possession of
16 child pornography by criminal complaint (#1). On July 19, 2016, the Government indicted Mr.
17 Ditirro for the original possession charge and added one count of sexual exploitation of children
18 under 18 U.S.C. § 2251(a) (#13). During the Government's subsequent investigation of Mr.
19 Ditirro, it superseded the original indictment and charged him with the original possession count
20 and four counts of sexual exploitation of a minor (#80). The Government now moves to exclude
21 the following: (1) evidence that any of the four victims consented or voluntarily participated in
22 sex acts with Mr. Ditirro; (2) evidence that the victims misled Mr. Ditirro as to their actual age;
23 and (3) evidence that the victims engaged in other sexual activity before or after their encounters
24 with Mr. Ditirro.

25 **II. Legal Standard**

26 A party may move in limine to exclude anticipated prejudicial evidence before or during
27 trial. Luce v. United States, 469 U.S. 38, 40 n.2 (1984). Judges have broad discretion when
28 ruling on these motions. See United States v. Castillo, 615 F.2d 878, 886 (9th Cir. 1980). And

1 these evidentiary rulings should be deferred until trial so that the Court has context to address
2 questions of foundation, relevancy, and potential prejudice. Hawthorne Partners v. AT&T Tech.,
3 Inc., 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). This is because the Court is “almost always better
4 situated during the actual trial to assess the value and utility of evidence.” Wilkins v. Kmart
5 Corp., 487 F. Supp. 2d 1216, 1219 (D. Kan. 2007).

6 **III. Analysis**

7 The Government argues that Mr. Ditirro should not be permitted to present evidence of:
8 (1) the victims’ purported consent to their sexual encounters with Mr. Ditirro; (2) the victims’
9 representations to Mr. Ditirro regarding their ages at the time of those encounters; and (3) the
10 victims’ sexual history and predisposition to engage in sexual behavior. Mr. Ditirro counters
11 with two arguments. First, he contends that granting the Government’s motion would effectively
12 eliminate his defense leaving Mr. Ditirro to “serve himself up to the jury on a carving board to be
13 devoured down to his very bones.” Second, he argues that he is entitled to leeway to question the
14 victims regarding their relationship with Mr. Ditirro and to explore a possible defense based on
15 his good-faith belief that his victims were over eighteen years old. The Court addresses each of
16 the Government’s requests in turn.

17 **A. The Victims’ Alleged Consent**

18 The Government first argues that any evidence that Mr. Ditirro’s victims consented to sex
19 with him is irrelevant and therefore inadmissible. Alternatively, even if there was consent to a
20 sexual relationship, the Government contends, the victims were minors and unable to legally
21 consent to producing child pornography. The Court agrees.

22 To be admissible, evidence must be relevant. Fed. R. Evid. 402. Relevant evidence is any
23 evidence that tends to (1) make a fact more or less probable than without that evidence; and (2)
24 that fact is of consequence to determining the action. Fed. R. Evid. 401. Rule 403 limits relevant
25 evidence and excludes evidence when its probative value is substantially outweighed by the
26 danger of unfair prejudice. Fed. R. Evid. 403. Rule 403 creates a balance wherein the degree of
27 probative value is weighed against potential unfair prejudice. It follows that relevant evidence
28 with slight probative value requires a lesser risk of unfair prejudice to warrant exclusion. See

1 United States v. Hill, 981 F.2d 422, 424 (9th Cir. 1992).

2 Evidence that these victims consented to a sexual relationship with Mr. Ditirro is not
3 relevant to determine whether he exploited them under 18 U.S.C. § 2251(a). The fact that a
4 sexual relationship is legal under state law does not authorize the production or possession of
5 child pornography. United States v. Laursen, 847 F.3d 1026, 1036 (9th Cir. 2017). Despite the
6 state allowing a minor to consent¹ to a sexual relationship, Congress retains the authority to
7 protect their sensitive interests. It follows that the government may protect even a willing minor
8 from “self-destructive” or exploitative decisions that would “expose him or her to the harms of
9 child pornography.” Id. at 1033. Other circuits agree that a minor’s consent to sexual intercourse
10 is not a defense to production and possession of child pornography. See Ortiz-Graulau v. United
11 States, 756 F.3d 12, 21–22 (1st Cir. 2014) (minor’s willingness to engage in a sexual relationship
12 did not legitimize the sexually explicit photos of the victim); United States v. Street, 531 F.3d
13 703, 708–09 (8th Cir. 2008) (district court “properly concluded consent was not a defense” to
14 sexual exploitation of a minor).

15 In short, while state law may allow a minor to consent to sex, she cannot consent to
16 producing pornographic images or videos. And her valid consent to sexual activity is not relevant
17 to determining whether Mr. Ditirro sexually exploited her under the statute. Accordingly, the
18 Court grants the Government’s motion with respect to the victims’ alleged consent.

19 **B. Mr. Ditirro’s Belief of the Victims’ Ages**

20 Next, the Government seeks to exclude evidence of Mr. Ditirro’s alleged mistaken belief
21 that the victims were eighteen years old. Mr. Ditirro counters that this evidence is admissible
22 under the reasonable mistake of age affirmative defense. This defense arises out of the balance
23 between First Amendment speech protection and protecting the wellbeing of minors. See United
24 States v. U.S. Dist. Ct. for Cent. Dist. of Cal., 858 F.2d 534, 542 (9th Cir. 1988). However, the
25 defense sets a high bar for relief.

26 Mr. Ditirro must demonstrate by clear and convincing evidence that he did not know the
27 victims’ ages and that he could not have reasonably learned that they were minors. Id. at 543. In

28 ¹ The statutory age of consent in Nevada is sixteen. See NRS § 200.364(10).

1 United States v. U.S. Dist. Ct., the defendants—members of a professional film-production
2 company—cast a sixteen-year-old actress in a film that depicted her engaged in sexually explicit
3 conduct. Id. at 536. The defendants were under the impression that the actress was an adult. Id.
4 In fact, the actress went to great lengths to conceal her minority including falsifying California
5 photo identification and other official documents to misrepresent her age. Id. at 540. In addition,
6 the minor had previously appeared in various “mass-market” pornographic magazines and other
7 X-rated films, which lent additional legitimacy to her claim of majority. Id.

8 The Court determined that imposing strict liability on these defendants could chill
9 otherwise protected speech because the risk of violating the statute would be too great to produce
10 such media.² To avoid a “fatal collision with the First Amendment,” the Court allowed the
11 defendants to present evidence that despite reasonable efforts, they were unable to ascertain the
12 minor’s actual age. Id. at 543. In doing so, it recognized that “cases like [that] one, where the
13 actress allegedly engaged in a deliberate and successful effort to deceive the entire industry, are
14 likely to be exceedingly rare.” Id. at 543. As a result, a defendant has the burden of showing by
15 clear and convincing evidence that he did not know the victim was underage and that he could
16 not have reasonably learned of the victim’s minority. Id.

17 Mr. Ditirro has not yet provided what evidence he intends to introduce to pursue this
18 defense. Accordingly, an offer of proof is needed before the Court can determine whether Mr.
19 Ditirro may introduce evidence that he reasonably misunderstood the victims’ ages. The Court
20 has discretion to determine whether a defendant has produced sufficient evidence to proceed
21 with its defense. See United States v. Boulware, 558 F.3d 971, 974 (9th Cir. 2009) (“trial court
22 may preclude a defense theory where ‘the evidence, as described in the defendant’s offer of
23 proof, is insufficient as a matter of law to support the proffered defense’”). Therefore, the Court
24 denies the Government’s motion on this issue without prejudice, pending an offer of proof.

25 **C. Victims’ Sexual History, Conduct, and Predisposition**

26 Finally, the Government asks the Court to exclude any evidence of the victims’ sexual
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28 ² At the time, the defendants were facing up to ten years in prison and a \$100,000 for each count. United States v. U.S. Dist. Ct., 858 F.2d 534, 540 (9th Cir. 1988).

1 history, conduct, and predisposition. Mr. Ditirro does not directly dispute this. Federal Rule of
2 Evidence 412 governs the admissibility of evidence in sex-offense cases. Rule 412(c) details the
3 procedure to determine whether evidence of a victim's prior sexual history is admissible. If a
4 party intends to introduce such evidence, it must file a motion and describe the potential
5 evidence and how the party intends to use that evidence at least fourteen days before trial.³ The
6 party must then serve the motion and notify the victim. Fed. R. Evid. 412. The Court would then
7 hold a hearing giving both the defendant and victim the opportunity to be heard. Id.

8 Here, Mr. Ditirro has not moved for such a hearing under Rule 412 and therefore may not
9 introduce this evidence. Trial is scheduled to begin on October 15, 2018. Mr. Ditirro filed his
10 opposition the Government's motion in limine on October 8, 2018. To date, he has not requested
11 a 412 hearing to determine the admissibility of the victims' prior sexual history, conduct, or
12 predisposition. As a result, the Court has not reviewed this potential evidence nor have the
13 victims had the opportunity to be heard that the rule affords them. Therefore, the Court grants the
14 Government's motion in limine as to evidence of the victims' sexual history, conduct, and
15 predisposition before or after Mr. Ditirro's actions in this case.

16 **IV. Conclusion**

17 Accordingly, IT IS HEREBY ORDERED that the Government's Omnibus Motion in
18 Limine to Exclude and Limit Argument, Questioning, and Evidence at Trial (#99) is **GRANTED**
19 in part and **DENIED** in part;

20 IT IS FURTHER ORDERED that the Court **GRANTS** the motion as to the issue of the
21 victims' alleged consent as well as to the issue of any victim's sexual history, conduct, or
22 predisposition;

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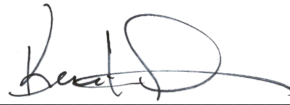
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28 ³ The rule allows a good cause exception to the fourteen-day requirement. Mr. Ditirro has not moved the
Court for an extension nor does the Court find good cause to extend that deadline. Fed. R. Evid. 412(c).

1 IT IS FURTHER ORDERED that the Court **DENIES WITHOUT PREJUDICE** the
2 motion as to the issue of whether Mr. Ditirro may present evidence to support a defense of good-
3 faith mistake of age pending an offer of proof.

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5 Dated this 11th day of October, 2018.

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9 Kent J. Dawson
10 United States District Judge
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